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IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR (C.G.)

W.P.NO. 1739 **/2003**

PETITIONER

Fekanlal Sahu, son of Shri Kalaram Sahu, aged about 68 years cultivator, resident of village-Amagohan (Khongsara), Tah. Kota, Distt. Bilaspur (Chhattisgarh).

VERSUS

RESPONDENTS

1) Smt. Bhakti Das widow of Dinesh Chandra, aged about 70 years, resident of Kargi Road Kota, Tah. Kota, Distt. Bilaspur (Chhattisgarh).

2) Deepak Kumar Das, aged about 42 years, son of Shri Dinesh Chandra Das, resident of BALCO, Korba, Tah and Distt. Korba, Chhattisgarh

3) Pradeep Kumar Das, aged about 30 years, son of Shri Dinesh Chandra Das, resident of Manendragarh, Distt. Sarguja (Chhattisgarh).

4) Smt. Putul Dutta, wife of A.K. Dutta, aged about 50 years, (daughter of Dinesh Chandra Das) resident of Pandunagar, Shahdol, Distt. Shahdol (Chhattisgarh).

5) Smt. Kajal daughter of Dinesh Chandra Das, aged about 44 years, resident of Kargi Road Kota, Tah Kota, Distt. Bilaspur (Chhattisgarh).

6) Smt. Ujjal daughter of Dinesh Chandra Das, aged about 32 years, resident of Kargi Road Kota, Tah. Kota, Distt. Bilaspur (Chhattisgarh).

7) Sheo Singh aged about 30 years, son of heera Singh, cultivator and teacher, resident of Amagohan (Khongsara, Tah. Kota, Distt. Bialspur (Chhattisgarh)

8) Narendra Singh, aged about 27 years, son of Shri heera Singh,

9) Devendra Singh, aged about 25 years, son of Shri Heera Singh.

R. No. 935/03
received by Shri P.P. Sahu
dated 21.02.03

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10) Surendra Singh, aged about 20 years, son of Shri Heera Singh.

11) Smt. Triveni Bai, aged about 63 years, widow of Heera Singh.

All residents of village Amagohan Kongsara, Tah. Kota, Distt. Bilaspur (Chhattisgarh).

12) Second Civil Judge, Class-II, Bilaspur (Chhattisgarh).

Attested 21(3)/6/05

Deleted as per Court order dated 20/6/05

24/6/05

WRIT PETITION UNDER ARTICLE 227 OF THE CONSTITUTION OF INDIA.

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आदेश पत्रक

मामला क्रमांक WP.NO.1739/03 सन् 200

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..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	4-7-2005 Shri P. P. Sahu, counsel for the petitioner. Shri Ali Asgar, counsel for respondents No.7 to 11. None for other respondents. Heard on I.A. Nos.5475/2005 and 2948/2005. For the reasons mentioned in the applications, the same are allowed. Documents are taken on record. I have heard Shri P.P. Sahu, learned counsel for the petitioner and Shri Ali Asgar, counsel for respondents No.7 to 11 on merit of the petition. By this petition the petitioner has questioned the legality, propriety and correctness of the order dated 3-11-2000 passed by learned 2nd Civil Judge, Class-I, Bilaspur on an application moved by the petitioner herein under Section 65 of the Evidence Act in Civil Suit No.110-A/2000 (Fekanlal V. Smt. Bhaktidas and others). Brief facts, necessary for the disposal of this writ petition, leading to filing of this writ petition are that the petitioner herein filed a civil suit bearing No.110-A/2000 which is pending before the 2nd Civil Judge, Class-I, Bilaspur for specific performance of the contract. After filing of the written statement and framing of issues, the matter was fixed for evidence of the petitioner herein. An application under	

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मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Section 65 of the Evidence Act was filed by the petitioner mentioning therein that the said suit has been filed on the basis of un-registered agreement to sale dated 27-6-84 and Xerox copy of the same has been filed along with the plaint. He retained the original document with him with the intention that the same will be filed before the Court at the relevant time that is at the time of adducing of evidence. In the meantime, defendant Shiv Singh filed a suit in the Revenue Court and during making preparation for adducing the evidence, the said agreement to sale was lost and that could not be traced out. Therefore, the plaintiff be allowed to adduce secondary evidence in respect of execution of the document dated 27-6-1984. An affidavit in support of the said application was filed by Gendlal, son of the plaintiff mentioning therein that the plaintiff, who is father, is heart patient and sick person therefore, he is prosecuting the civil suit, as such he is aware about the facts of the case, as such averments of the application are true to his knowledge.

Reply of the application was filed and after hearing learned counsel for the parties, the trial Court rejected the application of the petitioner vide impugned order dated 3-11-2000 mentioning therein that the affidavit of the plaintiff has not been filed in support of the application and the document dated 27-6-1984 is un-registered which is

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -3-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

not admissible in evidence and there is overwriting on the year of the document, therefore, permission cannot be granted.

Learned counsel for the petitioner submitted that as far as affidavit of son of the plaintiff is concerned, it has been mentioned in the affidavit itself that the plaintiff being an old person and heart patient was not able to come to the Court and son of the plaintiff who has filed the affidavit was regularly looking after the plaintiff, therefore, affidavit in support of the application was filed by son of the plaintiff. He further submitted that other ground raised by the trial Court that year of the document has been forged, the same can be looked into by the trial Court at the time of evidence and final judgment and respondents are entitled to raise that ground and that can be looked on merit after allowing the parties to adduce the evidence.

As far as third ground on which the application was rejected that the document in question is un-registered, learned counsel for the petitioner submitted that under the law the agreement to sale is not required to be compulsorily registered, therefore, the petition be allowed and impugned order be set-aside.

On the other hand, learned counsel for respondents No.7 to 11 submitted that in the first instance, the application was filed at a very belated stage and year of execution of the document prima facie

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित –4–	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

appears to be forged that instead of 1982, 1984 has been interpolated by overwriting over the word '2'. In the circumstances, the document becomes suspicious, therefore, the document cannot be allowed to be proved by the secondary evidence.

Having heard learned counsel for the parties, I have perused the record. In this regard, clauses-(b) and (c) of Section 65 of the Evidence Act are relevant which envisage that 'when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest'; and 'when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time.'

In the light of above legal position, if we look into the factual position, the petitioner herein in para-2 of the plaint has mentioned that on 27-6-84 defendant No.1 Dinesh Chandra after taking Rs.500/- in advance executed the document regarding the sale of the disputed property in consideration of Rs.5500/- and also handed over the possession to the petitioner in token thereof. On that date defendant Dinesh Chandra in presence of the witnesses executed the document and handed over the same to the petitioner and since then the petitioner is in peaceful possession of the land. In para-2 of the written statement it

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is mentioned that it is incorrect to say that on 27-6-84 any agreement to sale in consideration of Rs.5500/- was executed in favour of the petitioner after advancing Rs.500. The petitioner is in possession as a tenant. In para-14 of the additional written statement it has further been mentioned that as the defendant No.1 i.e. Dinesh Chandra was not in need of any house because he had constructed the house at other place, therefore, construction over the land was agreed to be sold to the petitioner in consideration of Rs.5500/-. The agreement was executed on 27-6-82 and Rs.500/- was given to the defendant No.1 as advance money and it was agreed that the sale deed will be executed by 31st December 1982. The defendant No.1 had no right to transfer the land.

Therefore, in view of the above pleadings of the parties, the petitioner has mentioned in the plaint that the agreement was executed on 27-6-84 whereas, the defendant No.1 has admitted execution of the document but it was stated that the agreement was executed on 27-6-82, therefore, it becomes a matter of evidence which can be decided by the trial Court after allowing the parties to adduce the evidence on this point. In such a situation, it is admitted position that some document was executed between the parties whether it was executed in the year 1982 or 1984. The said question has to be decided by the trial Court. The petitioner has filed an application that the said original agreement

(पीछे देखिये)

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित —6—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

to sale has been lost and in spite of best effort he has not been able to trace out the same and in support of the application son of the petitioner has filed the affidavit and, therefore, there was no reason before the trial Court and this Court to disbelieve the affidavit as there is nothing on record which makes the said affidavit doubtful, therefore, in my opinion, the requirements of clauses (b) and (c) of Section 65 of the Indian Evidence Act, 1872 are satisfied and in such a situation, learned trial Court ought to have allowed the plaintiff to adduce secondary evidence with regard to execution of agreement to sale of the disputed property.

As far as question of interpolation of the figure '2' to '4' i.e. year 1982 to 1984 is concerned, it is again a matter of evidence and the respondents herein are entitled to raise that objection, adduce the evidence and cross-examine the plaintiff and witnesses on that point and while deciding the question of execution and existence of document, the trial Court can pass the order on the objection.

As far as registration is concerned, it is admitted position that the agreement to sale is not required to be compulsorily registered.

As has been held by the Hon'ble Apex Court in the matter of **Nawab Singh v. Inderjit Kaur**, reported in **AIR 1999 SUPREME COURT 1668**, in para-3, that '.....*we are of the opinion that the trial*

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Court was not justified in rejecting the prayer for production of secondary evidence. The prayer has been rejected mainly on the ground that the copy of the rent note sought to be produced by the appellant was of doubtful veracity. The trial Court was not justified in forming that opinion without affording the appellant an opportunity of adducing secondary evidence. The appellant has alleged the original rent note to be in possession of the respondent. The case was covered by Clause (a) of Section 65 of the Indian Evidence Act, 1872.'

In view of the above, I am of the considered opinion that the impugned order passed by the trial Court is contrary to the provisions of Section 65 of the Indian Evidence Act and the same is liable to be set aside.

In the result, the writ petition is allowed and the trial Court is directed to allow the petitioner to adduce the secondary evidence as prayed for and to proceed with the suit in accordance with law. As the suit is pending since 1987, therefore, the trial Court is directed to expedite the trial and try to dispose of the case at the earliest.

In view of this order, M.(W)P.No.1582/2003 and I.A. Nos.2125/2005, 4935/2005 stand disposed of.

Parties are entitled for certified copy of this order.

Sd/-
L.C. Bhadoo
Judge

Barwe